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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Section 73.202(b) of the) MM Docket No. 98-176
Commission's Rules, FM Table of Allotments) RM-9363
(Killeen and Cedar Park, Texas))

To: The Chief, Allocations Branch

**COMMENTS OF GULFSTAR COMMUNICATIONS
KILLEEN LICENSEE, INC.**

GulfStar Communications Killeen Licensee, Inc. ("GulfStar"), the licensee of radio station KIIZ-FM, Killeen, Texas, by its attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.420, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.¹ The Notice seeks comment on a Petition for Rulemaking ("Petition") filed by LBJS Broadcasting Company, L.P. ("LBJS") requesting the reallocation of Channel 227C from Killeen, Texas to Cedar Park, Texas, and the modification of its license for Station KAJZ(FM), Killeen, to specify Cedar Park as KAJZ(FM)'s community of license. As demonstrated below, a grant of the LBJS proposal would seriously undermine the Commission's policies and objectives as embodied in the FM Table of Allotments and Section 73.207 of the Commission's rules.

¹ DA 98-1939, released September 25, 1998.

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In support of its Petition, LBJS argues that the reallocation would result in a preferential arrangement of allotments because it would provide Cedar Park with its first local aural service. KAJZ(FM) is a pre-1964 grandfathered station short-spaced with KLBJ(FM), Austin, TX, but LBJS contends that the grandfathered short-spacing survives the proposed community switch and complies with the Commission's minimum distance separation requirements as contained in Section 73.207 of the Rules. It cites the Commission's decision in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992), in support of this proposition.

It is well established that the Commission will not create an allotment that fails to meet the minimum mileage separation requirements of Section 73.207. That rule has existed for decades, and Section 1.420(i) of the Commission's Rules, which affords the Commission the ability to modify the license of an FM station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's present assignment, does not alter this basic requirement.

In *Newnan*, the Commission stated that it would consider waiving strict application of Section 73.207 "in limited circumstances, provided that no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased." *Newnan*, 7 FCC Rcd at 6397, see also *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (1991). The facts of *Newnan*, however, were limited to short-spacings between stations that were grandfathered pre-1964, before the Section 73.207 minimum separation requirements were adopted.

As the Commission recognizes in its Notice, however, the proposed reallocation of Channel 227C to Cedar Park is not only short-spaced to Station KLBK, Channel 229C, Austin, Texas (a pre-1964 grandfathered short-spacing), but also to Station KSTV, Channel 226C3, Dublin, Texas; Station KPLV, Channel 227C1, Port Lavaca, Texas; and Station KKZN, Channel 227C2, Haltom City, Texas. This is illustrative of the proliferation of post-1964 short-spacings that has resulted from changes in the Commission's technical rules since 1964, particularly the adoption of Section 73.215, which allows applicants routinely to propose short-spaced sites in proposals for new and modified FM stations. The instant proceeding, therefore, raises the more expansive and troubling question of whether the policy articulated in *Newnan* should be extended to allow new allotments that carry over violations of Section 73.207 with respect to post-1964 FM stations that are not now in conformity with the Commission's current spacing requirements. Indeed, recognizing the broad implications of LBJ's proposal for the Commission's allotment policies, the Notice specifically requests comment on whether *Newnan* should be extended to encompass post-1964 short-spacings.

GulfStar submits that extension of *Newnan* beyond the limited universe of pre-1964 grandfathered short-spaced stations would serve only to eviscerate further the important objectives served by the Commission's FM Table of Allotments. The original Section 73.207 mileage separation rules were adopted "as the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service." *Greater Media, Inc.*, 59 FCC 2d 796, 797 (1976); see also *ECI License Company, L.P.*, 11 FCC Rcd 3545, 3546 (MMB), *aff'd*, 106 F.3d 442 (D.C. Cir. 1996). The Commission

has long held that “strict enforcement of the mileage separation rules is of paramount importance to the integrity of the entire FM assignment plan.” *Boone Biblical College*, 19 FCC 2d 155, 156 (1969). While GulfStar does not dispute the merit of enhancing broadcasters’ flexibility to modify facilities and serve desired markets, such actions should be taken only if consistent with the Commission’s core obligation to further the public interest through adherence to the Section 73.207 minimum distance separations. Accordingly, the circumstances in which the Commission will waive such adherence should be limited rather than expanded.

GulfStar submits, therefore, that the LBJs request should be denied. While, as in *Newnan*, grant of the LBJs petition would result in the removal of one allotment from the FM Table of Allotments that does not comply with current spacing requirements and the addition of a new allotment that does not comply with current spacing requirements at a new community, *Newnan*’s scope was limited to short-spacings which pre-existed the regulatory paradigm established through adoption of the Table of Allotments. Given the relatively small universe of pre-1964 grandfathered stations to which the policy articulated in *Newnan* applies, the resulting circumvention in that decision of the objectives embodied in Section 73.207 can perhaps be justified.

Acceptance of the LBJs proposal, however, would exponentially extend a substantially more lenient allotment separation requirement, allowing large numbers of stations to seek and obtain new allotments, in the form of channel reallocations to new communities, which continue numerous violations of Section 73.207 that came into existence after 1964. To so propose suggests that the Table of Allotments is unimportant

and unnecessary, and begs the question of whether the Commission should make new allotments based solely on the notion that no new interference would be created, rather than on a showing of compliance with the minimum distance separation requirements set forth in Section 73.207.

The Commission consistently has refused to consider petitions that seek the allotment of short-spaced channels because the allotment of such substandard channels would undermine the very objectives which the allotment rules were designed to foster. See, e.g., Front Royal, Virginia, 10 R.R. 2d 1752 (1967). The fact that KAJZ is not proposing to move its transmitter site, but rather simply to “carry over” no less than four existing short-spacings, should not excuse the creation of what is in fact a new short-spaced allotment. The Commission will not make a short-spaced allotment, and has rejected most attempts to justify substandard allotments. Grant of the LBJS petition, however, would permit vast numbers of post-1964 short-spaced stations to propose scores of substandard new allotments under Section 1.420(i), effectively rendering the Section 73.207 allotment spacing requirement a nullity.² This seems all the more contrary to Commission policy when it is considered that licensees and permittees seeking upgrades under Section 1.420(g) must continue to meet the full spacing standards of Section 73.207.

² The Commission can then expect many such stations, having received “maneuvering room” through a community change, to file applications to move to different sites. A considerable number of these applications can be expected to invoke Section 73.215. That will create even more short-spacings which – under an extension of *Newnan* – the Commission will excuse at the allotment stage for other community change proponents, allowing the cycle to continue.

The FM Table of Allotments is the Commission's fundamental mechanism for preserving the public interest goal of an interference-free FM service. See *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990); *Millington, Maryland*, 45 R.R. 2d 1689, 1690-91 (1979). While the policy articulated in *Newnan* was aimed exclusively at the small number of pre-1964 grandfathered short-spaced stations, grant of the LBJS petition would constitute a revised allocation approach extending far beyond this limited universe, which would disserve the public interest by further eviscerating the purposes served by the Table of Allotments, the regulatory paradigm through which the technical integrity of the FM band heretofore has been preserved and enhanced. GulfStar requests, therefore, that the LBJS Petition be denied.

Respectfully submitted,

**GULFSTAR
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Dated: November 16, 1998

CERTIFICATE OF SERVICE

I, Claudia L. Lucas, a secretary in the law firm of Wiley, Rein & Fielding, hereby certify that a copy of the foregoing "Comments of GulfStar Communications Killeen Licensee, Inc." was sent this 16th day of November, 1998, by first class United States mail, postage prepaid, to the following:

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